CASE NO: 89-1588

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CURTIS L. WRENN,

Petitioner,

v.

STATE OF OHIO,
MEDICAL COLLEGE OF OHIO,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

BEST AVAILABLE COPY

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QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT'S DECISION THAT AN EEOC DETERMINATION IS NOT A "MATERIAL FACT" WHICH WOULD PRECLUDE SUMMARY JUDGMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL?

II. WHETHER THE ORDER AND ALLOCATION OF THE BURDENS OF PROOF UTILIZED BY THE LOWER COURTS SHOULD BE REVIEWED?

III. WHETHER SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE?

PARTIES

PURSUANT TO RULE 34.1(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, THE PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED ARE LISTED IN THE CAPTION OF THE CASE.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Northern District of Ohio, Western Division are unreported. These opinions are reproduced in their entirety in Appendix B and C accompanying Petitioner's Brief in Support of Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1), 1651 and 1915.

CONSTITUTIONAL PROVISIONS INVOLVED

There are no constitutional provisions involved herein.

STATEMENT OF THE CASE

Petitioner, hereinafter Wrenn, submitted application for four positions advertised by Respondent, Medical College of Ohio, hereinafter MCO. The applications were made between August 1981 and January 1982 for Assistant to the President, Director of Ambulatory Care, Administrative Assistant, and Executive Director positions. Wrenn was not selected for any one of these positions nor was he interviewed for said positions.

No one was hired for the Director of Ambulatory Care position. The Administrative Assistant position a secretarial/clerical position - was filled by an individual possessing such skills. Wrenn would have been over qualified for the position. MCO, in searching for an Executive Director, sought a candidate possessing a masters degree in health administration or business administration, experience in a teaching hospital, experience

with the State of Ohio and five to ten years in a leadership position. Approximately 160 individuals applied for this position. Selection of those individuals to be interviewed was based upon the criteria and review of applications. Criteria for the assistant to the president position consisted of experience in a college setting and with continuing education.

Wrenn's age nor date of birth were reflected on his resume which was submitted in application for the positions. Further, the individuals selected more closely met the criteria for successful applicants.

In April of 1982, Wrenn filed suit against MCO wherein he alleged employment discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and 42 U.S.C. §§2000d and 2000e. Specifically, Wrenn claimed he was not hired due to his age, race and in retaliation for having previously filed civil rights actions against other State of Ohio

agencies. In essence, Wrenn claimed the existence of a continuing conspiracy against him.

The case was pending in the district court for six years. Summary judgment was sought by and granted to Respondent. Wrenn appealed the grant of summary judgment to the United States Court of Appeals for the Sixth Circuit. Wrenn contended that the grant of summary judgment was clearly erroneous and constituted an abuse of discretion by the district court.

The Sixth Circuit Court of Appeals affirmed the decision of the district court, noting that Wrenn failed to provide any specific facts from which discrimination could be inferred nor did he offer any evidence to overcome MCO's legitimate non-discriminatory reason for not hiring him.

Wrenn now seeks a grant of certiorari.

REASONS FOR DENIAL OF THE WRIT

I. THE DISTRICT COURT'S DECISION THAT AN EEOC DETERMINATION IS NOT A "MATERIAL FACT" WHICH WOULD PRECLUDE SUMMARY JUDGMENT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL.

Wrenn contends that the granting of Defendants' motion for summary judgment is clearly erroneous. This conclusion is based upon the claim that the district court's statement that an EEOC determination is not evidence of a material fact upon which Wrenn could rely to overcome the properly supported motion for summary judgment is contrary to the decisions in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Plummer v. Western International Hotels, Inc., 656 F.2d 502 (9th Cir. 1981); and Blizzard v. Fielding, 572 F.2d 13 (1st Cir. 1978). For this reason, Wrenn argues that certiorari should be granted in this action.

This Court, in Trafficante, found that the construction afforded by Housing and Urban Development (HUD) to 42 U.S.C. §3610(a)'s phrase "person[s] aggrieved" was entitled to great weight, Trafficante, 409 U.S. at 210. In that case, the question being presented was whether the plaintiffs had standing under 42 U.S.C. §3610(a). Thus, construction of the statutory provision was at issue. The Court noted that the administrative agency's construction should be given defference in such circumstances.

The Ninth and First Circuits, referring to EEOC probable cause findings, held that while such findings are admissible evidence, they are not binding upon the court. Plummer, F.2d 656 at 504 and Blizzard, 572 F.2d at 16. In the Blizzard decision, the First Circuit also commented that a "no probable cause" finding will not bar a trial de novo. 572 F.2d at 16. "Both parties are entitled to an inquiry by a court into the charges ... we cannot say that a

court is obliged to refer to those findings in its opinion." Id. Because the trial in the district court is de novo there would be little sense to making EEOC determinations binding. This is particularly so given the extensive discovery which is ordinarily conducted in such cases.

The mere fact that EEOC determinations may be admissible evidence does not mean that such findings are "material facts" for summary judgment purposes. The district here concluded that the EEOC determination could not be relied upon by Wrenn in opposing the motion for summary judgment as it was not evidence of a "material fact". Material facts are delineated by the applicable substantive case law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). Thus, only those facts which can affect the outcome of the case may preclude summary judgement. Id.

"Material facts" to a Title VII and ADEA action would be those elements creating a prima facie case of discrimination and specific facts in opposition to non-discriminatory reasons for the employment decision. The EEOC finding of probable cause here does not constitute a material fact as it would not be an element of Wrenn's prima facie case and more importantly would not be a specific fact in opposition to the articulated nondiscriminatory reasons for the employment action.

Accordingly, the decision below does not conflict with law of this Court or other circuits and the granting of certiorari is not warranted.

II. THE ORDER AND ALLOCATION OF THE BURDENS OF PROOF UTILIZED BY THE LOWER COURTS WERE IN ACCORDANCE WITH GOVERNING CASE LAW AND NEED NOT BE REVIEWED.

The courts below followed the appropriate governing standards with respect to Wrenn's Title VII and ADEA claims. Respondent moved for summary judgment with respect to each of Wrenn's claims, (29 U.S.C Section 621; Title VII 42 U.S.C. Section 2000(e)) based upon the lack of a genuine issue as to material fact and the lack of evidence to support the allegations.

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621 et seq., provides that an employer may not refuse to hire a person within the protected age group (between forty and seventy years of age) because of such individual's age. 29 U.S.C. Section 623(a)(1). It is not unlawful, however, for an employer to fail to hire a person within the protected age group for good cause. 29 U.S.C. Section 623(f)(3).

The law is clear that the ultimate issue in an age discrimination suit is whether age was a determining factor which made a difference in the employment decision. Blackwell v. Sun Electric Corp, 696 F.2d 1176, 1180-81 (6th Cir. 1983) citing Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982). As with a case based upon race discrimination the Plaintiff may demonstrate a prima facie case by showing (1) he was a member of the protected class (2) the adverse employment decision (3) he was qualified for the position and (4) a younger person was selected. Id. at 1180 citing Ackerman 670 F.2d at 69. A prima facie case of age discrimination will not, however, be established by merely stating personal conclusions. Locke v. Commercial Union Insurance Co., 676 F.2d 205 (6th Cir. 1982). Further, the mere showing of an age differential will not be sufficient to meet the burden of proof in an action brought pursuant to 29 U.S.C. Section 621 et seq. The

courts below in reviewing the motion for summary judgment applied this governing case law.

The evidentiary test to determine whether or not a plaintiff has successfully shown desparate treatment based upon an unlawful, discriminatory motive has been clearly set forth by this Court. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). See also Furnco Construction Co. v. Waters, 438 U.S. 567 (1978). The test was explained in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) where it was stated:

> First, the plaintiff has the burden of proving by the preponderance of evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." (Citation omitted). Third, should the defendant carry this burden the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

A prima facie case means a rebuttable presumption that Plaintiff was treated differently than other similarly situated employees because of his race. A prima facie case of race discrimination may be shown by demonstrating: (1) that Plaintiff belongs to a racial minority; (2) that Plaintiff applied for an was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, Plaintiff was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of the plaintiff's qualifications. McDonnell-Douglas Corp. v. Green, 411 U.S. at 802-804. See also Texas Department of Community Affairs v. Burdine, 450 U.S. at 250.

If the Plaintiff establishes a prima facie case, the burden then shifts to the Defendant to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the

action that effected the Plaintiff. The defendant need only raise a genuine issue of fact as to whether it discriminated against Plaintiff; it need not prove that it was motivated by the articulated reason or prove that the employment action was lawful. At no time does the defendant have the burden of proving the absence of discriminatory motive. Texas Department of Community Affairs v. Burdine, 450 U.S. at 254. Instead, the defendant, assuming a prima facie case has been established, need only "explain what he has done" or "articulate" a legitimate, nondiscriminatory reason for the action. Board of Trustees of Keene State College v. Sweney, 439 U.S. 24 (1978).

If the Defendant carries this burden, the Plaintiff must then prove by a preponderance of the evidence that the reasons offered by the Defendant are a pretext for discrimination. This burden merges with the Plaintiff's ultimate

burden of proving intentional discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). See also Grano v. Department of Development of City of Columbus, 637 F.2d 1073 (6th Cir. 1980).

Again, this clearly established law setting forth the order of and burden of proof was appropriately applied by the court of appeals and the district court. The order and allocation of the burdens of proof were consistent with the McDonnell-Douglas and Texas Department of Community Affairs decisions. The order of proof, as set forth in those decisions, provides a useful and organized method for presenting the elements of the claim. The burden of proof, "preponderance of the evidence," is consistent with that applied in most civil actions.

In light of the fact that the order and allocation of burdens of proof used herein were consistent with governing case law there is no basis for review.

III. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE.

The standard utilized by the district court in reviewing the motion for summary judgment and by the court of appeals in affirming that decision was announced in Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Pursuant to that standard, the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The moving party may meet this burden by showing that there is an absence of evidence to support the nonmoving party's claims. Celotex, 477 U.S. at 324-325. Where this initial burden

is met, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. Emphasis added. The party opposing summary judgment must make a showing sufficient to establish the existence of an element essential to its case and which it will bear the burden of proof at trial. Celotex, 477 U.S at 323. Material facts are identified by the applicable substantive case law. Anderson, 477 U.S. at 248. As a result, only those disputes of facts which can affect the outcome of the case may preclude summary judgment. Id.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment...". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Kendall v. The Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984). The mere existence of a scintilla of evidence in

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As to the retaliation claim Wrenn stated, "[t]he primary reason Plaintiff was not hired for any of the jobs which he applied is because he had protested unlawful employment practices." No where in Wrenn's opposition was the district court cited to evidence which would support his claims of race and retaliation nor raise a genuine issue for trial with respect to the legitimate nondiscriminatory reasons articulated by the employer.

Although questioned at his deposition and asked to provide facts upon which he based his claims of discrimination, Wrenn would not provide any information.

Both courts below recognized that even assuming that a prima facie case was made, Wrenn did not offer any evidence to overcome the legitimate nondiscriminatory reasons for Wrenn not being hired. Wrenn engages in essentially the same exercise here as he has done in the lower courts, still failing to recognize that

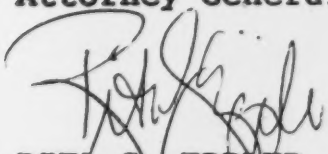
the motion for summary judgment, which was supported by pleadings and depositions, requires more than his unsupported assertions and conclusions to be overcome.

IV. CONCLUSION

Based upon the arguments presented herein the decisions of the lower courts are consistent with prevailing case law of this Court and other courts of appeal. Accordingly, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General



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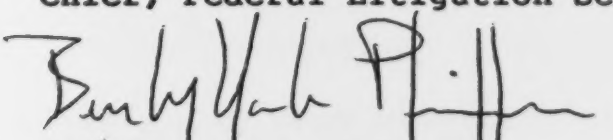

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CERTIFICATE OF SERVICE

I, Rita S. Eppler, counsel of record for Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of July, 1990, I served a copy of the Respondent's Brief in Opposition on Curtis L. Wrenn, P.O. Box 203, Fort Drum, New York 13603, via U.S. Mail, postage prepaid.

I further certify that all parties required to be served have been served.

RITA S. EPPLER
Counsel of Record

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Affiant, having been first duly cautioned and sworn, states on information and belief that, pursuant to United States Supreme Court Rule 29.2, 12 copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were deposited in a United States Mailbox, first class postage prepaid, and addressed to the Clerk of Court, Supreme Court of the United States,

Washington, D.C. 20543, by employees of the Ohio Attorney General's Office, on July 13th, 1990.

BEVERLY YALE PFEIFFER
Assistant Attorney General

Sworn to and subscribed before me, a Notary Public, this 13th day of July, 1990.

NOTARY PUBLIC

BENNETT A. MANNING
ATTORNEY AT LAW
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE
SECTION 147.03 R.C.